

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ADA M. WESLEY)	
Claimant)	
VS.)	
)	
ST. FRANCIS REGIONAL MEDICAL CENTER)	Docket No. 180,122
Respondent)	
AND)	
)	
ST. FRANCIS HOSPITAL OF WICHITA)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

The Kansas Workers Compensation Fund requested Appeals Board review of the Award entered by Administrative Law Judge John D. Clark dated November 28, 1994, and the Award Nun Pro Tunc dated November 30, 1994.

APPEARANCES

Claimant appeared by her attorney, James B. Zongker of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Alexander B. Mitchell, II, of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Cortland Q. Clotfelter of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge assessed 100 percent of the award against the Kansas Workers Compensation Fund (Fund). The Fund appealed and at oral argument limited the appeal to the single issue of nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing arguments of the parties, the Appeals Board finds as follows:

The Administrative Law Judge found claimant was entitled to permanent partial general disability benefits based on a 28.5 percent work disability. The Administrative Law Judge's Award contained the stipulation of the parties that claimant met with personal injury by accident on May 18, 1993, that arose out of and in the course of her employment with the respondent. Respondent's submission letter to the Administrative Law Judge also contained that stipulation. Therefore, the only unresolved issues listed in the Administrative Law Judge's Award for decision were nature and extent of claimant's disability, claimant's entitlement to unauthorized and future medical expenses, and the liability of the Fund.

The Fund, however, at oral argument, raised the issue of whether claimant's accidental injuries arose out of her employment with respondent. The Fund argued that while claimant's accident occurred in the course of her employment, i.e. while at work, the issue was whether the injury arose out of her employment. In summary, the Fund argued that almost any everyday activity would aggravate claimant's preexisting low back and hip conditions. The Fund cited the case of Martin v. U.S.D. No. 233, 5 Kan. App. 2d 298, 615 P.2d 168 (1980) as a case similar to the facts of this case where the Court of Appeals denied claimant compensation holding that the employee's injuries resulted from a risk personal to the employee and not associated with his employment. A risk personal to the employee is not compensable. The Fund contended that the risk involved in claimant's accident was not associated with her employment and was, therefore, a personal risk. Accordingly, the Fund asserted claimant's injuries are not compensable because the risk was personal to claimant and had no causal connection to her employment.

The Appeals Board finds it does not have jurisdiction to review the issue of whether claimant's injury arose out of her employment because the issue was not before the

Administrative Law Judge for decision. The Appeals Board's jurisdiction is limited to review of issues presented and introduced before the Administrative Law Judge. See K.S.A. 1995 Supp. 44-555c, as amended. The parties stipulated the claimant met with personal injury by accident arising out of and in the course of her employment with the respondent on May 18, 1993. Therefore, since the Administrative Law Judge did not make a finding in regard to that issue, the Appeals Board is without authority to review the issue.

The Fund further argued that if claimant was found to have met with personal injury by accident while working for the respondent, the claimant had failed to prove she suffered a permanent injury to her groin, back, and right shoulder. The Fund claimed that any injury suffered by the claimant on May 18, 1993, resulted in only a temporary injury or aggravation and not a permanent injury. The Fund relied on the testimony of claimant's treating physician, orthopedic surgeon Bruce R. Buhr, M.D. After reviewing an MRI, Dr. Buhr opined that claimant's right groin injury was not related to her preexisting spinal stenosis found in her low back area. Dr. Buhr also opined that claimant's preexisting arthritic condition was not aggravated or accelerated by claimant's accident. In addition, the doctor determined claimant's right shoulder injury sustained during the MRI examine had resolved without permanent impairment. Although claimant remained symptomatic, Dr. Buhr opined claimant had no permanent functional impairment in accordance with the AMA Guides, Third Edition, Revised. Dr. Buhr released claimant from his care to regular work on October 6, 1993, without permanent restrictions.

On the other hand, claimant asserted the Administrative Law Judge's award of a 28.5 percent work disability was inadequate and a much larger work disability was supported by the record. The claimant argued the Administrative Law Judge erred when he only considered vocational expert Jerry Hardin's opinion on claimant's loss of wage earning ability of 57 percent based on Dr. Ernest Schlachter's permanent restrictions. Claimant contended Jerry Hardin's opinions on both loss of labor market ability and loss of wage earning ability should have been equally considered in arriving at claimant's entitlement to work disability. Mr. Hardin's testimony in regard to work disability was presented by the claimant and was uncontradicted. Claimant asserted the appropriate work disability award should have been Mr. Hardin's loss of labor market opinion of 90 to 95 percent averaged with claimant's loss of wage earning ability of 57 percent for a 75 percent work disability.

Whether claimant is entitled to permanent partial disability benefits depends on whether claimant suffered permanent injuries as a result of the May 18, 1993 work-related accident. As previously noted, Dr. Buhr, claimant's treating physician, opined claimant had not sustained a permanent injury and he returned claimant to her regular employment with no permanent work restrictions. Two other physicians testified in this case, Phillip R. Mills, M.D., for the respondent, and Ernest R. Schlachter, M.D., for the claimant. Both of those physicians opined claimant had permanently aggravated her preexisting arthritic condition and had further sustained a permanent injury to her right shoulder during the MRI examination. Dr. Mills clarified on cross-examination that his whole body

permanent functional rating should have been calculated at 17 percent instead of 18 percent. In addition, Dr. Mills testified that claimant's pre-injury spinal stenosis condition was not aggravated by her work related injury. Consequently, he revised his whole body impairment rating to 7 percent which included only a permanent aggravation of claimant's arthritic condition and the injury to her right shoulder. However, Dr. Schlachter opined claimant had permanently aggravated both her preexisting arthritic condition and spinal stenosis condition due to her work related accident. Dr. Schlachter found claimant had a 19 percent whole body permanent functional impairment resulting from her groin, low back, and right shoulder injuries.

Dr. Mills permanently restricted claimant to sedentary activities of no work or reaching above shoulder level, occasional walking or standing, lifting limited to 10 to 15 pounds, no squatting, bending, or stooping. Dr. Schlachter placed permanent restrictions on claimant's activities of no single lifts over 30 pounds, no repetitive lifts over 20 pounds, avoid sitting and standing at one time for more than 15 minutes, and avoid stair climbing. Both physicians agreed claimant was unable to return to performing her work activities as a lead person in the laundry room for the respondent.

Claimant testified that she had worked in the laundry room for the respondent for a total of 31 years. Her work activities in the laundry room required her to be on her feet all day, bend and twist some 50 to 55 times per hour, lift between 25 and 45 pounds, push, and work with her hands extended in front of her.

Both Dr. Mills and Dr. Schlachter have extensive experience in treating, examining, and evaluating injured workers. Conversely, Dr. Buhr at the time of his deposition had only been practicing medicine for 1½ years and had issued opinions in regard to permanent partial functional disability in accordance with the AMA Guides on only 12 other occasions. The Appeals Board concludes that greater weight should be given to Dr. Mills' and Dr. Schlachter's medical opinions over the opinions of Dr. Buhr. Therefore, the Appeals Board finds, as a result of claimant's injuries, she has sustained a permanent functional impairment of 13 percent based on Dr. Schlachter's 19 percent rating and Dr. Mills' 7 percent rating.

Claimant was treated conservatively from May 26, 1993, through October 6, 1993, by Dr. Buhr. She was released for regular work on October 6, 1993. However, Dr. Verlyn Schwartz, doctor for the respondent, did not return claimant to her regular work. Respondent eventually terminated claimant on November 28, 1993, without offering claimant an accommodated position. At the time of the regular hearing, held on May 2, 1994, claimant was not working. In fact, claimant testified she had not tried to find other employment since she had last worked for the respondent. Claimant established she had applied for social security benefits and such benefits had been granted to start in May 1994. Claimant testified her back, groin, and right shoulder remained symptomatic. She further established she had to walk with the aid of a cane because at various times her right leg would give out.

The evidentiary record also established claimant had suffered a previous injury in 1988 while employed by the respondent. That injury primarily was located in the thoracic area of her back instead of her low back. Respondent provided medical treatment through its private health insurance company and denied claimant's back injury was work related. Claimant was off work for approximately a three month period of time. Prior to returning to work, at the direction of Dr. Schwartz, claimant underwent an evaluation of her physical capabilities by the Work Assessment and Rehabilitation Center. The evaluation report limited claimant to sedentary work. Sedentary work was defined as work which consisted of limited lifting of 10 pounds, working in a sitting position except for a certain amount of walking and standing to enable one to carry out necessary job duties. Respondent claimed claimant was working under those preexisting conditions at the time she was injured on May 18, 1993. However, claimant testified that in 1988 she returned to her regular work in the laundry room and did not work within those restrictions. The Administrative Law Judge concluded the 1988 restrictions were in effect for the claimant on the date of her injury in May 1993. The Administrative Law Judge found claimant's preinjury restrictions would have resulted in very little loss of access in the open labor market although there was evidence claimant was working outside those restrictions. The Administrative Law Judge went on to find claimant had not proven she had lost any of her ability to access the open labor market. He adopted only claimant's loss of wage earning ability of 57 percent and averaged the zero loss of labor market to find a work disability of 28.5 percent.

The Appeals Board finds claimant's testimony established that after she returned to work in 1988 following her back injury, she worked outside the work restrictions imposed pursuant to the physical capabilities evaluation. Claimant returned to her regular job in the laundry room which required her to stand all day on her feet, lift up to 45 pounds, and repetitively push, bend, twist, and stoop. The physical capabilities evaluation summary that the respondent argued applied to the claimant prior to her May 1993 injury actually prohibited claimant from performing her regular job and restricted her to sedentary employment. The Appeals Board concludes respondent cannot require claimant to work outside her preinjury work restrictions and then argue those work restrictions either deny or severely limit her work disability loss.

The Appeals Board concludes from the evidence in the record that the respondent did not offer claimant a comparable wage job after she was released to return to work following the May 18, 1993, injury. Therefore, the no work disability presumption contained in K.S.A. 1992 Supp. 44-510e(a) does not apply. Accordingly, claimant is eligible for permanent partial disability benefits based on work disability.

The only evidence presented on work disability was by claimant's vocational expert, Jerry Hardin. Utilizing Dr. Schlachter's permanent restrictions, which were less restrictive than Dr. Mills' restrictions who testified for the respondent, Mr. Hardin opined claimant had lost 90 to 95 percent of her ability to perform work in the open labor market and 57 percent of her ability to earn a comparable wage. Having found claimant had worked outside her preinjury restrictions, the Appeals Board concludes that both these components of the work

disability test should be weighed equally entitling the claimant to a 75 percent work disability. See Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

The Appeals Board adopts the findings and conclusions of the Administrative Law Judge contained in his Award that are not inconsistent with the specific findings made in this Order.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated November 28, 1994, should be, and is hereby, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Ada M. Wesley, and against the respondent, St. Francis Regional Medical Center, and the Kansas Workers Compensation Fund, for an accidental injury which occurred May 18, 1993, and based upon an average weekly wage of \$474.70.

Claimant is entitled to 20.57 weeks of temporary total disability compensation at the rate of \$299 per week or \$6,150.43, followed by 394.43 weeks at the rate of \$237.36 per week, or \$93,621.90, for a 75% permanent partial general work disability, making a total award of \$99,772.33.

As of November 20, 1996, there is due and owing claimant 20.57 weeks of temporary total disability compensation at the rate of \$299 per week or \$6,150.43, followed by 162.57 weeks of permanent partial compensation at the rate of \$237.36 per week or \$38,587.62, for a total of \$44,738.05, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$55,034.28 is to be paid for 231.86 weeks at the rate of \$237.36 per week, until fully paid or further order of the Director.

The Kansas Workers Compensation Fund is ordered to pay all compensation benefits and costs of this Award.

All authorized medical expenses incurred by the claimant as a result of her accidental injury shall be awarded the claimant.

Unauthorized medical expenses up to the statutory maximum of \$350 are awarded the claimant upon proper presentation of the medical statement.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the Fund to be directly paid as follows:

Barber & Associates

Transcript of Regular Hearing	\$183.20
Transcript of Preliminary Hearing	\$ 62.50
Deposition of Philip R. Mills, M.D.	\$252.80
Deposition of Diane Compton	\$ 93.00
Deposition of Ray Rancuret	\$216.20
Deposition of Bruce R. Buhr, M.D.	\$290.00

Kelly, York & Associates, Ltd.

Deposition of Jerry D. Hardin	\$230.95
Deposition of Ernest R. Schlachter, M.D.	\$169.55

IT IS SO ORDERED.

Dated this ____ day of November 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Wichita, KS
Alexander B. Mitchell, Wichita, KS
Cortland Q. Clotfelter, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director